Office Supreme Court, U.S.
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No. 1015

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

NO. 3 BULL TOWING COMPANY, THE BULL DURHAM & BARGE, NBC 965,
Petitioners,

vs.

MONSANTO CHEMICAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions	1
Jurisdiction	1
Questions Presented	2
Statement	3
Argument	12
The Barge was Not Unseaworthy	12
A Vessel Is Not Unseaworthy as a Matter of Law Where Loss Is Caused Not by the Vessel, Its Appurtenances or Its Crew, But by the Isolated and Completely Unforeseeable Introduction of a Foreign Object From Without	14
The Court of Appeals in Its Opinion Erroneously Concluded That the Market Value of the Ethyl Gasoline Was Proven	16
Conclusion	17

Table of Citations.

Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104	13
Krey v. United States, 123 F. (2) 1008 (2nd Cir., 1941)	16
Mitchell v. Trawler Racer, 362 U. S. 539, 4 L. ed. 2d 941, 80 S. Ct. 926	13
Morales v. Galveston, 370 U. S. 165, 8 L. ed. 2d 412, 82 S. Ct. 1226 (1962)	14, 15
Puget Sound Power & Light Company v. Public Utility District No. 1 of Whatcom County, 123 Fed. 2d 286	17
Van Corpicas v. S. S. Harvester, 297 F. (2) 9 (2nd Cir., 1961)	16

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To the United States Court of Appeals for the Sixth Circuit.

OPINIONS.

The District Court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 22a-36a. The opinion of the Court of Appeals is reported at 326 F. (2) 18.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on December 18, 1963. The timely Petition of No. 3 Bull Towing Company, The Bull Durham & Barge, NBC 965, etc. for a rehearing was denied on March 3, 1964, by the Court of Appeals for the Sixth Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Significant questions of admiralty law are presented in this suit to recover damages for contamination of petroleum products due to an alleged unseaworthy condition of a barge.

The following questions are presented:

(1) Whether a shipper, who loaded a barge through its agents, inspected the barge cargo compartments, valves and all barge appurtenances before and after loading, sealed all hatches and valves after loading, tested all valve wheels before loading and who was in charge of unloading its product from the barge, be allowed to recover damages for contamination of its products where the owner of the barge, as a private carrier, furnished to the shipper a barge which was reasonably fit for its intended use and where there was no actionable negligence on the part of the owner, the captain, officers and crew of the barge.

(2) Whether a vessel is unseaworthy as a matter of law where loss is caused not by the vessel, its appurtenances or its crew, but the isolated and completely unforeseeable introduction of a foreign agent from without.

(3) Whether the evidence of market value of gasoline may be established by the testimony of witness who did not know of his own knowledge of market value of gasoline at the point of delivery, but who was allowed to testify as to market value from a pricing schedule which was made by others who did not testify and which pricing schedule was used to recapitulate damages claimed for such contamination.

STATEMENT.

This is an action in admiralty for damages resulting from a contamination of premium or ethyl gasoline by kerosene. The cause of action is based upon the alleged unseaworthiness of the Barge NBC 966 and the fault and neglect of the No. 3 Bull Towing Company.

The Petitioner contends that the Barge NBC 966 was seaworthy and that it exercised ordinary care in the transportation of the cargo which is the subject of this suit.

Sometime prior to April, 1957, the Respondent, Monsanto Chemical Company, through its subsidiary, Lion Oil Company, entered into an oral contract with the Petitioner, No. 3 Bull Towing Company, whereby for an agreed consideration the No. 3 Bull Towing Company agreed to provide the entire capacity of the towboat Bull Durham and the Barges NBC 966 and 965 to said Respondent for the purpose of carrying and transporting Respondent's petroleum products from Helena, Arkansas, to the Respondent's terminal in Memphis, Tennessee (App. pp. 23a, 254a). The contractual agreement between the parties was discussed in February, 1957, between representatives of the Respondent and Mr. Edwin T. Bull, president of the No. 3 Bull Towing Company. The agreement for the transportation of the Respondent's products did not include either the loading of said petroleum products on said barges or the unloading of said products at Respondent's terminal (App. pp. 24a, 256a, 418a).

The Petitioner, No. 3 Bull Towing Company, and the barge NBC 966 had been transporting the Respondent's products for a number of years prior to April, 1957, and in particular during the month of April, 1957, Petitioner with its tow had made a trip to Memphis, Tennessee, from Helena, Arkansas, and again another trip from Helena, Arkansas, to Chicago, Illinois (App. 24a, 254a).

Upon completion of the unloading of the barges at the Respondent's terminal in Chicago, Illinois, the towboat Bull Durham and barges NBC 966 and 965 proceeded to the Helena Terminal of Project Five Pipeline Corporation and the same arrived on April 24, 1957, and loading of products on board the barges began on April 25, 1957 (App. pp. 257a, 281a).

Prior to the arrival of the towboat Bull Durham and barges NBC 966 and 965, at the Project Five Pipeline Corporation terminal at Helena, Arkansas, the captain of the towboat inspected their compartments and found them to be empty. Upon arrival at the Helena terminal, the shore personnel directed the captain of the towboat as to where to spot or place barges 966 and 965. (App. pp. 24a, 317a, 330a). After spotting same for loading, the captain and the crew remained aboard the towboat moving off some distance while the loading operations were performed on the barges. Prior to loading, the Project Five Pipeline Corporation again made an inspection of all cargo tanks and found them to be empty and in good condition to receive the various petroleum products. On this occasion, the captain of the tow herein followed the usual custom and practice established at this terminal by delivering the barges to the loading terminal for loading. None of the crew or officers of the towboat Bull Durham either supervised or controlled in any manner the loading of the barges and in particular Barge 966. The loading, including the supervision and control thereof, was done entirely by the employees of Project Five Pipeline Corporation, who were acting for and on behalf of Lion Oil Company in so doing (App. pp. 24a, 25a, 223a, 229a, 317a). The Respondent paid to the Project Five Pipeline Corporation as part of its tariff the transportation of the petroleum products from El Dorado, Arkansas, through pipeline to Helena, Arkansas, and the loading of products from

the terminal at Helena into the barges (App. pp. 23a, 25a, 65a).

Barge 966 is fitted with a pipe or cargo header line running longitudinally along its bottom and down its center. The barge has ten cargo tanks, five on each side thereof. The ten inch cargo header line is equipped with the necessary valves to service its separate cargo compartments and runs from the forward tanks to an eight inch athwart ship line used in discharging cargo. From the cargo header line aforesaid, individual feeder lines equipped with valves run to each compartment so that when loading or discharging products, the flow to or from each of the tanks or compartments can be controlled and so that by use of the valves the integrity of each of the compartments may be maintained (App. p. 25a).

For each compartment there is a valve located inside, near the bottom of the compartment with the stem of the valve running up above deck and through the expansion dome. There is a wheel on the expansion dome which controls the opening and closing of the valve itself. The valve wheel turns in a clockwise manner to close and opens in a counter-clockwise movement.

The valves of the 966 are of the Jenkins globe-type with internal threads, the movements and inner workings of which cannot be observed from the hatch opening located on the expansion dome. The only method for examining the movements and inner workings of these valves is by removing and dismantling them (App. pp. 25a, 242a).

Upon completion of the loading of the barges, inspection was made by Project Five personnel of all of the compartments of barge 966. The inspectors took samples from each compartment by lowering a bottle or can attached to a cord into each and taking a small quantity of the product therefrom. These samples were tested and

no mixture or contamination of gasoline with kerosene or kerosene with gasoline was detected. During and upon completion of loading, all valves on barge 966 were checked by Project Five personnel and found to be operating properly. Project Five employees then closed all of the valves and hatches, securing them with wire and lead seals. After the hatches and valves had been sealed the compartment valves could not be opened without a breaking of the seals. After loading, inspection, sampling and sealing of the barges had been completed, the dock superintendent of Project Five notified the captain of the Bull Durham that the barges were ready and the same were received by the Bull Durham for towing. The tow was thereupon moved to the Lion Terminal at Memphis for delivery (App. pp. 26a, 223a).

As the tow proceeded to Memphis, no checks were made of the valves on Barge 966, and it was not customary or proper to do so as the same had been sealed by the Pipeline Corporation of Helena when the loading was completed (App. pp. 26a, 230a, 318a).

At about 11:45 A. M. on the morning of April 26, 1957, the Petitioner's tow consisting of the Bull Durham and barges 966 and 965 arrived at the Memphis Lion Terminal dock with its cargo of petroleum products. Captain Cobb, of the Bull Durham, was in the pilot house of the vessel as the tow reached the Lion dock. Upon orders from the Lion terminal personnel, he directed the mooring of the barges at the dock. Barge 966 was placed alongside and adjacent to the dock and 965 alongside it with the bows of both barges headed down stream. Both barges were spotted opposite the pipelines on the dock aforesaid, which comes to the water's edge. Each of the pipelines is controlled by a gate valve and leads to the shoreline which runs the length of the dock and then turns inland under ground to the shore storage tanks (App. pp. 27a, 319a).

At about 12:10 P. M., Edgar Miles, the dock foreman for the Lion Oil Company, who is a certificated tankerman, and Robert Wages, the terminal operator for the Lion Oil Company, who is also a certificated tankerman, came aboard barge 966 to begin cargo discharge operations. It was their first responsibility to determine the contents of the barge and whether such was proper to be received into the shore tanks. They were assisted by one or more members of the crew of the Bull Durham in attaching a flexible rubber hose from the pipeline on the dock to the barge's discharge line which extends across the stern of the vessel (App. pp. 27a, 107a).

The Lion employees readied the dock facilities to receive the products. The Lion employees, including Miles and Wages, first broke the seals on the valves and hatches and gauged the compartments. Miles and Wages, further, as a part of their duties, examined all of the valves on the 966 and found them in good working order prior to the commencement of discharge of the products. Captain Cobb and Wylie Warren, the deckhand and tankerman on the towboat, also checked the valves on each compartment on barge 966 in company with the shore personnel. (App. pp. 27a, 28a, 114a, 115a, 164a, 166a).

It was determined by samples taken by the shore personnel prior to the unloading of any of the products from 966 that there was no mixture or contamination of gasoline into any of the other compartments, particularly the diesel compartments 3 and 4, port and starboard, and the kerosene tanks, No. 5 port and starboard (App. pp. 28a, 113a).

Wages opened the valves on Nos. 1 and 2 port and starboard tanks, containing the ethyl or high octane gasoline which was to be discharged first. The pump engine located near the stern of the barge was primed and started by Wylie Warren. Next, Miles and Wages checked the

hose connections and ascertained that the barge was ready to commence discharge of its products. At about 1:20 P. M. the shore gate valve was opened by Lion personnel, being the last step prior to commencement of actual delivery of the products from the barge to the shore tank and the discharge operations were under way.

The entire unloading operations were under the control, supervision, and direction of the Lion Oil Company and its personnel, including its certificated tankerman on duty at the time, and they gave the necessary orders to Wylie Warren, whose duty it was to tend the engine of the pumps on the 966, as to when to engage or disengage the said pumps (App. pp. 28a, 121a, 271a, 320a, 335a, 354a; 375a, 376a).

At about 3:00 P. M. on this date, April 26, 1957, the crewman Warren noticed a list to port of the barge 966 and notified the Lion dock tankerman who commenced an immediate investigation as to cause of the same (App. pp. 28a, 336a). It was discovered that the No. 5 starboard valve which controlled the No. 5 starboard tank containing kerosene was opened to some degree, permitting kerosene to be pumped into the main header line and into the shore tank simultaneously with the ethyl gasoline being pumped from the forward compartments. The investigation further revealed that the level of the kerosene was down some three feet in the starboard tank No. 5 which represented a discharge from that tank of approximately 14,000 gallons. This kerosene had been pumped out along with approximately one-half, or 125,000 gallons of ethyl gasoline aboard into the shore tank also containing ethyl gasoline. Warren disengaged the pump engine and the Lion foreman and superintendent, were notified of the trouble (App. pp. 29a, 275a, 322a, 327a).

At or about the time the pumping ceased, Mr. Ed Bull, president of the Petitioner's company, arrived at the Lion dock. Upon his arrival, two men, one of his crew

and one of the Lion personnel, were closing the No. 5 starboard valve by turning its wheel with the aid of a metal bar (App. pp. 29a, 272a, 273a). Bull stopped this attempt at closing the valve to prevent the possible breaking of the valve stem, then proceeded to ascertain the facts as to what had occurred. During the time he was investigating the matter at or about 4:00 or 4:30 P. M., Marion Warren, the regular mate of the tug Bull Durham arrived at the dock to resume his duties as a member of the crew, following a leave of absence therefrom. Marion Warren, upon being advised of the difficulty with the No. 5 starboard valve, immediately proceeded to turn the valve wheel thereon and was successful in turning it by a one-fourth to one-half turn completely closing it. The Lion Oil Company dock tankerman and dock employees were present at this time and they participated in the closing of the valve and were satisfied that the valve was properly closed (App. pp. 273a, 364a, 372a, 373a).

Matthews, the Lion tankerman who was on duty during the unloading operation, testified that during the process of the unloading operation he made a check of all valves on the barge and found the same to be operating properly. He also stated that as a part of his duties he looked into the kerosene compartments while the gasoline was being pumped off and that he did not notice any discrepancy. Matthews also checked the starboard valve when the list was discovered and he stated at this time that the valve appeared to him to be working properly and was tightly closed (App. pp. 199a, 200a, 201a).

Before pumping operations were resumed, Mr. Bull, on behalf of the Petitioner, insisted that samples be taken from the other compartments of the 966 to determine whether or not any mixture or contamination had occurred with respect to them. Samples from each were taken and it was determined that no gasoline had gotten

into either the kerosene or diesel compartments. However, some kerosene had been pumped into the shore tank containing ethyl gasoline along with the ethyl gasoline from compartments 1 and 2 of barge 966. After test and samples had been made, Bull was informed by the Lion dock employees that there was not sufficient contamination to affect or downgrade the product to any material extent. Following a delay of some three or four hours, the pumping operations were resumed under the orders and directions of the Lion personnel (App. pp. 29a, 30a, 146a, 275a, 276a, 277a, 278a).

The contamination or mixture of kerosene with the ethyl gasoline herein occurred after the delivery of same to the Respondent's dock at Memphis, Tennessee, and during the transfer of these products into Lion's shore tanks by the agents, servants, or employees of the Lion Company (App. pp. 30a, 335a, 337a).

The pumping operations continued without incident to completion of the unloading at or about 5:30 A. M. on the morning of April 27, 1957. Barges 965 and 966 with the tug Bull Durham departed the Lion dock about 5:45 A. M. that morning to return to Helena, Arkansas, Terminal. Barges 965 and 966 next proceeded to carry petroleum products for the Lion Oil Company from Helena to Chicago, Illinois, during which operation the loading and unloading were uneventful and no difficulty was found with the No. 5 starboard valve on Barge 966 (App. pp. 31a, 277a, 278a, 323a).

Upon completion of the Chicago trip, Barge 966 was taken to the Petitioner's dock at its headquarters in Joliet, Illinois. Following its arrival, Mr. Art Warren, port engineer for Petitioner company, under instructions from Mr. Ed. Bull, its president, made an inspection of the No. 5 starboard valve of said barge. In doing this the valve and valve stem were removed and there was

revealed therein a cotton cord of the type used by petroleum inspectors tied to the neck of a broken sample bottle and a hex nut. The cord which was approximately 15 feet long had become entwined around and in the threads of the valve (App. pp. 31a, 278a-280a, 378a-382a).

This was an internal type valve and the cord could not be seen by visual inspection either from the hatch on the deck or by examination from within the compartment (App. pp. 31a, 383a).

The cord was removed from the valve threads and the valve was replaced without any repairs being required. Prior to removal of the cord, it could not be determined by turning the valve wheel whether there was a cord or other foreign matter therein. There were no repairs of any kind made to the valve (App. pp. 31a, 383a-386a).

The type cord and the attached neck of the broken bottle and the hex nut were of the same type used by those who sample petroleum products on barges. Such gear during the time in question was not used by the crew members of the Petitioner towing company. The cord and its attachment were kept in the Petitioner's office at Joliet, Illinois, for approximately a year, but were later displaced or lost (App. pp. 31a, 383a-386a).

Following the unloading of all the products in the barges, the Lion Company had further tests made of the quality of the gasoline in the No. 6 shore tank and at that time determined that such gasoline would not meet the required specifications of 99 Octane ethyl gasoline and therefore had to be disposed of as a lower grade gasoline. This gasoline was sold to the Triangle Refineries at Houston, Texas, at a loss to the Lion Oil Company (App. pp. 31a, 57a). The trial court found that upon sale of the contaminated product, the Lion Oil Company suffered a net loss of $19,160.01 (App. p. 33a). The Court of Appeals affirmed the decision of the District Court.

ARGUMENT.

The Barge Was Not Unseaworthy.

Prior to loading the petroleum products on board the barge, the Respondent's agents, the inspectors of the Project Five Pipe Line Corporation, made an inspection of all cargo tanks and found them empty and in good condition to receive the various petroleum products. During and upon completion of loading the barge in question, all valves were checked by the agents of the Respondent and found to be operating properly (App. pp. 24a, 25a, 223a-229a and 317a).

After loading, Respondent's agents took samples from each compartment by lowering a bottle or can attached to a cord into each compartment and taking a small quantity of product therefrom. These samples were tested and no mixture or contamination of gasoline with kerosene or kerosene with gasoline was detected (App. pp. 26a, 223a).

The valves on the barge in question were working properly at the time of loading and the valves were completely closed upon loading; otherwise, there would have been contamination of product. The proof is undispited that there was no contamination or mixture during or after loading (App. pp. 221a, 226a).

The Respondent's personnel at Memphis, upon arrival of the barge, again made a check of the valves and the contents of the compartments. The Respondent's witness further testified that the No. 5 valve on the barge was in good order prior to commencement of discharge of product (App. pp. 27a, 28a, 114a, 115a, 164a, 166a).

Prior to removal of the cord from the No. 5 starboard valve, it could not be determined by turning the valve wheel whether there was a cord therein. The type of cord

and the hex nut were of the same type used by those who sample petroleum products on barges. The crew members of the Petitioner did not use such equipment (App. p. 32a).

The Trial Court found that the loading and unloading were under the control of the Respondent and that there was no disclosure of any actionable negligence on the part of the Petitioner which proximately caused the contamination or mixture of the ethyl gasoline with the kerosene. The Respondent as found by the Trial Court was responsible for the closing of the valves on the barge.

Under the doctrine of seaworthiness, all that is required of any ship owner is that he furnish a vessel and appurtenances reasonably fit for their intended use.

Mitchell v. Trawler Racer, 362 U. S. 539, 4 L. ed. 2d 941, 80 S. Ct. 926.

In the Mitchell case, supra, the Court stated:

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. **Boudoin v. Lykes Bros. S. S. Co.**, 348 U. S. 336, 99 L. ed. 354, 75 S. Ct. 382."

The Petitioner in the circumstances of this case was a bailee under a private contract of carriage and as such did not assume the obligations of a common carrier. It was not an insurer. In a case of this type, the burden of proving a breach of duty or obligation rests upon the Respondent. **Commercial Molasses Corp. v. New York Tank Barge Corp.**, 314 U. S. 104.

A Vessel Is Not Unseaworthy as a Matter of Law Where Loss Is Caused Not by the Vessel, Its Appurtenances or Its Crew, But by the Isolated and Completely Unforeseeable Introduction of a Foreign Object From Without.

It is submitted that the Respondent did not prove that the Petitioner breached its duty to furnish a seaworthy vessel at the commencement of the voyage. There is no finding or conclusion by either the Trial Court of the Court of Appeals in its opinion that the barge was unseaworthy at the time the barge was tendered for loading. The warranty of seaworthiness applied only at the beginning of a voyage. This is the rule which has been established by the Supreme Court of the United States and followed in subsequent cases.

It is respectfully submitted that the Court of Appeals by its opinion in this case holds in substance that, although there was no finding the barge was unseaworthy at commencement of the voyage, it nevertheless became unseaworthy due to the fact that a valve was open during the time the same was being unloaded by the Respondent.

In **Morales v. Galveston**, 370 U. S. 165, 8 L. ed. 2d 412, 82 S. Ct. 1226 (1962), longshoremen were engaged in "trimming" wheat as it was being loaded in the hole of a vessel. A last "shot" of grain was called for and was released into the hole of the vessel. This grain had been treated with a chemical insecticide and the longshoremen were injured by fumes from the chemical, made noxious by concentration in the closely confined area where they were working. The longshoremen's claim was predicated upon the negligence of the shipowner and upon the unseaworthiness of the ship. The District Court entered judgment in favor of the grain elevator operator and the shipowner and found that there was no negligence and that the vessel was not unseaworthy

although it lacked a forced ventilation system. The Court of Appeals affirmed and the Supreme Court likewise affirmed the decision of the lower court and held that a vessel is not unseaworthy as a matter of law where injury is caused not by the ship, its appurtenances, or its crew, but by the isolated and completely unforeseeable introduction of a noxious agent from without.

The facts in the instant case are analogous to those in the Morales case, supra. The lower Court found that the loading and unloading operations were under the control of the Respondent, its servants, agents or employees and there was no disclosure of any actionable negligence on the part of Petitioner which proximately caused the contamination or mixture of the ethyl gasoline with kerosene. The lower Court did not find that the valve in question was defective but that the valve was not closed properly. The proof is very clear that the Petitioner or its crew did not exercise any control over the closing of the particular valve. The Respondent as found by the Trial Court was responsible for the closing of the valve. The only thing which might have prevented the valve from closing was the introduction from without of a portion of a string, bottle top and hex nut into this compartment. Even with the string entwined around the threads of this valve, the valve could be closed and was in fact properly closed after this condition was discovered.

It is strongly urged by Petitioner that the introduction of the string was an unexpected and isolated occurrence over which the Petitioner had no control and the same could not be detected by inspection.

The valve in question did not require any repair and no repairs were made to the valve.

It is submitted that the reasoning applied by Justice Stewart in the Morales case, supra, would equally be

proper in this case. Justice Stewart, in speaking for the Supreme Court, stated:

> "What caused injury in the present case, however, was not the ship, its appurtenances or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without."

It is therefore respectfully urged that the Court erred in holding that the barge NBC 966 was unseaworthy.

The question of unseaworthiness is reviewable on appeal for that upon the ascertainment of the facts, the deduction of unseaworthiness is a conclusion of law, reviewable as such.

Van Corpicas v. S. S. Harvester, 297 F. (2) 9 (2nd Cir., 1961);

Krey v. United States, 123 F. (2) 1008 (2nd Cir., 1941).

The Court of Appeals in Its Opinion Erroneously Concluded That the Market Value of the Ethyl Gasoline Was Proven.

The only attempt by the respondent to establish the market value of its product in the resulting alleged loss was by the witness, Robert Garrison. This witness clearly stated that his knowledge of the market value of ethyl gasoline in the Memphis area was from the Lion Oil Company records (App. p. 80a). The witness Garrison was not employed by the respondent at the time the records were prepared. The court allowed the testimony of this witness by use of company records in order to refresh his recollection. It is respectfully submitted that it would be highly improper to allow these records to be used to refresh his recollection when, in fact, he did not have an independent knowledge of the market value of the gasoline in the Memphis area at the time of the alleged loss.

In this instance the Trial Court and the Court of Appeals has approved the use of evidence which is tendered by a witness who has no independent knowledge of value, but who is allowed to testify as an expert on value by reference to records made by others to refresh a recollection which, independently of the records, the witness does not have.

In this regard it has been and is clearly the law that the witness' opinion must be his own; he cannot act as a mere conduit for the opinions of others. Thus the opinion as to market value is incompetent where the witness has no general knowledge of his own, but is merely transmitting information received from others. **Puget Sound Power & Light Company v. Public Utility District No. 1 of Whatcom County**, 123 Fed. 2d 286.

CONCLUSION.

Wherefore, upon the foregoing grounds, it is respectfully urged that the Petition for Writ of Certiorari should be granted.

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Petitioners,

vs.

MONSANTO CHEMICAL COMPANY,
Respondent.

APPENDIX

To Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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INDEX.

	Page
Opinion of Court of Appeals for the Sixth Circuit....	1
Order Overruling the Petition to Rehear.....	18

OPINION OF THE COURT OF APPEALS.

(Filed Dec. 18, 1963, Carl W. Reuss, Clerk.)

Nos. 15057-58.

United States Court of Appeals
For the Sixth Circuit.

In Admiralty.

No. 15057

Monsanto Chemical Company,
Libelant-Appellee,

v.

No. 3 Bull Towing Company,
The Bull Durham, and
Barge NBC 965,
Respondents-Appellants

No. 15058

Monsanto Chemical Company,
Libelant-Cross-Appellant,

v.

No. 3 Bull Towing Company,
The Bull Durham, and
Barge NBC 965,
Respondents-Cross-Appellees.

Appeal from the District Court of the United States for the Western District of Tennessee.

Decided December 18, 1963.

Before: Weick and O'Sullivan, Circuit Judges, and McAllister, Senior Circuit Judge.

McAllister, Senior Circuit Judge. This is an appeal in an admiralty case in which the Monsanto Chemical Com-

pany,[1] hereinafter called plaintiff, sought damages from No. 3 Bull Towing Company, the Bull Durham, and Barge NBC 965, hereinafter called the defendants. The District Court found that the barge was unseaworthy because of a faulty valve, and that plaintiff's damages were directly and proximately caused by such unseaworthy condition.

The damages resulted from the contamination of ethyl gasoline by kerosene during the unloading of Barge NBC 965, at Memphis, Tennessee, on April 26, 1957. The barge in question has a ten-inch pipe, or header line, running longitudinally along its bottom, and is connected with each of ten large cargo tanks, or compartments. At the bottom of each of the tanks, there is a valve, with the stem of such valve running through the top of the tank and adjacent deck, above which there is a wheel that controls the opening and closing of the valve. When the valve of a tank is open, the petroleum product in the tank runs into the ten-inch pipe, or header line. To discharge the cargo, this header line is connected to a hose from the shore or dock, and the oil or gasoline, or other petroleum product, is pumped through the hose to tank cars, or storage tanks, or pipelines, on shore. In this case, while the valves on tanks 1 and 2, port and starboard, were open, and the ethyl gasoline from those tanks was running into the header line and being discharged through the hose to storage facilities on shore, it was discovered that the valve of No. 5 starboard tank, containing kerosene, was open, and that kerosene was leaking into the header line and contaminating the ethyl gasoline as it was being discharged to the shore.

The way in which it was first discovered that the kerosene was contaminating the ethyl gasoline was when Wiley

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[1] The Lion Oil Company mentioned throughout the case is a subsidiary of the Monsanto Chemical Company.

Warren, a member of the crew of the Bill Durham tow, in charge of the pumping engine, noticed that a couple of hours after the gasoline commenced to be discharged, the barge was listing. He told the dock man and shut off the pump under orders from plaintiff's representatives. They then looked into the No. 5 starboard tank of kerosene and found that the kerosene was down some three feet, which represented a discharge of approximately 14,000 gallons of kerosene which had been pumped out along with approximately 125,000 gallons of ethyl gasoline. It was then discovered that the valve of the No. 5 starboard kerosene tank was open—or not completely closed. One of the members of plaintiff's crew and one of the members of defendants' crew then prepared to close the No. 5 starboard valve by using a steel bar inserted in the wheel, but Captain Bull of the tug ordered them not to use the bar for fear of breaking the stem of the valve. At that time the regular mate of the tug, Marion Warren, came aboard, asked what was wrong, and succeeded in completely closing the valve.

The testimony is somewhat confusing as to the checking of the valves of the various tanks or compartments, before the unloading operations commenced. Edgar Miles, the superintendent of plaintiff's Memphis terminal, testified that before the unloading operation, he went aboard the barge to ascertain, among other matters, that all the valves were in a closed position; that, in doing so, he was working in cooperation with Wiley Warren, a member of the crew of defendant Bull Durham's tow; that Miles started at the port side, and Wiley Warren at the starboard side; that they proceeded walking side by side down the barge toward the stern; that when they came to the No. 5 compartments, in which the kerosene was being carried, they found that both port and starboard valves were open; that Miles closed the No. 5 port valve, and Wiley Warren went through the motion of closing the starboard valve, and appeared to close it at that time. After all the valves were

apparently closed, Robert Wages, plaintiff's senior terminal operator, came along behind Wiley Warren and checked all the valves by putting some pressure on the wheels in the closing position. He testified that the valves "seemed to **seat** properly" and appeared to be tight. The No. 5 starboard valve, as far as he could determine, was working properly and appeared to be closed, with the normal pressure he put on it. Captain Cobb, of the tow boat, testified that he checked the valves with Mr. Miles at the latter's request. He checked the No. 5 starboard valve without using any extra force, "Normally, like I normally close the valve, like it should be closed." He testified that he thought what he did was sufficient, but that it turned out that apparently it was not sufficient to close the valve.

When it was discovered that the kerosene was getting low in the No. 5 starboard tank, and was leaking into the header line, contaminating the ethyl gasoline that was being discharged, Marion Warren, the mate of the tow boat, as has been said, happened to come aboard the barge. When he was told about the situation, he proceeded to force the No. 5 starboard valve completely closed by throwing all his strength into turning the wheel to the closed position. He testified:

> "Q. Did you use any instrument or bar or anything to assist you?
>
> A. No, just my hands, with quite a bit of force, in fact, all I was able to do.
>
> Q. By jerking?
>
> A. Yes, sir, by jerking I did turn it down some. . . . I would say between a quarter and a half a turn."

Afterward, and subsequent to a return trip to Helena, Arkansas, the barge was loaded with petroleum products which it then carried to Chicago. Both the loading at

Helena and the unloading at Chicago were uneventful, and no difficulty was found with the valve in question. Upon completion of the Chicago trip, the barge was taken to defendants' dock at its headquarters in Joliet, Illinois. Following its arrival there the port engineer made an inspection of the No. 5 starboard valve of said barge. In doing this, the valve and valve stem were removed, and there was revealed therein a cotton cord of the type used by petroleum inspectors. The cord was tied to the neck of a broken sample bottle and a metal nut. The cord, which was approximately fifteen feet long, had become entwined around and in the threads of the valve. It was an internal type valve, and the cord could not be seen by visual inspection either from the hatch on the deck or by examination from within the compartment. It was removed from the valve threads and the valve was replaced without any repairs being required. Prior to removal of the cord, it could not be determined by turning the valve wheel whether there was a cord therein.

The Trial Court found that due to the malfunctioning of the valve, brought about by the cord being entwined around and in the threads of the valve, the barge was unseaworthy, and that its unseaworthy condition was the direct and proximate cause of the damages resulting to plaintiff company from the contamination of the kerosene with the ethyl gasoline.

It is clear that the valve with the cotton cord in its threads did not operate properly. That is seen from the fact that it was leaking kerosene into the other petroleum products until Marion Warren, the mate of the tug, came aboard and succeeded in forcing it closed by jerking the valve wheel with all the force of which he was capable. The valve did not properly seat with the ordinary force with which valves are closed. The barge was unseaworthy. With the cord intertwined in the threads of the valve, so

that it would leak kerosene while the gasoline from other compartments was being pumped out through the shore hose, the barge was not reasonably fit for its intended use. The duty to furnish a seaworthy vessel is absolute. **Mitchell v. Trawler Racer, Inc.**, 362 U. S. 539.

After the gasoline and kerosene were contaminated, plaintiff company sold the contaminated product at the best possible price to the Triangle Refineries at Houston, Texas, at a loss, and this loss with expenses of transportation to Memphis, and from Memphis to Houston, constitute the damages which plaintiff seeks to recover.

A difficult problem in the case arises out of the proof of damages.

No question is raised but what the measure of damages is the difference between the wholesale market of the uncontaminated gasoline and kerosene, and the highest price that could be, and was, received by plaintiff, when it sold the contaminated products at the best available market value. Counsel for defendants, in a colloquy, stated: "I understand the market value is the rule, certainly. I am trying to find out whether or not this is the market value."

There are three conclusions drawn by one or the other party as to the damages in this case, or by the Trial Court in its findings:

(1) That the market value of the ethyl gasoline, which was contaminated, was never legally proved by the Monsanto Chemical Company. This was the contention of defendant.

(2) That the market value of the ethyl gasoline, if it had not been contaminated when sold at Houston, would be 15.929 cents per gallon. This was the market value found by the Trial Court. Both parties disagree with this finding.

(3) That the wholesale market value of the ethyl gasoline at Memphis on April 26, 1957, amounted to 16.25 cents per gallon, as contended by the Monsanto Chemical Company.[2]

We have come to the conclusion that the evidence supports the findings of fact of the Trial Court, that the value of the ethyl gasoline, if it had not been contaminated at the time it was sold at Houston, would amount to 15.929 cents per gallon; that while the Trial Court could have found that the value of the gasoline at Memphis on April 26, 1957, was 16.25 cents per gallon, nevertheless, it was for the Court to choose among the conflicting proofs of damage; and that its judgment should be affirmed upon its findings of fact and conclusions of law.

In his testimony, Mr. Garrison referred to letters, recapitulations and records of the plaintiff company. The records were kept at El Dorado in the department of which he had charge, and which were under his direct supervision and control, although Mr. Garrison himself had not been associated with plaintiff company until three years after the damages from the contamination occurred. Nevertheless, among the actual records of the company which were placed in Mr. Garrison's hands during his direct examination, was the barge loading order addressed to plaintiff Monsanto Company in Memphis, for the barge, "loaded with [the] product which was [later] sold to Triangle Refinery" as well as the invoice from plaintiff Monsanto Company to Triangle Refineries, Inc. where the contaminated oil was eventually sold. Mr. Garrison testified that he was familiar with the pipeline tariff from the plaintiff's refinery at El Dorado, Arkansas, to its terminal at Helena, Arkansas, —which was ten cents a barrel—and

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[2] There is no difficulty with regard to the contaminated kerosene, as that was sold at a price in excess of its original value.

this figure was the same as shown by the records of plaintiff company, which also was the published and accepted pipeline tariff; that the towing cost from Helena to Memphis, to which he testified, was calculated from defendant's own invoice for the transportation of the oil and gasoline; that the tax on towing from Helena to Memphis was a given amount, calculated from defendant company's own invoice for towing charges; that the Tennessee state tax upon the contaminated petroleum product exported from Tennessee to Houston, where it was eventually sold, was a given amount. Mr. Garrison was then asked:

> "Q. Unit sales price, fifteen-five, that is 15.5 cents, was that the established price in April, 1957, for gasoline, 99 premium gasoline at El Dorado, Arkansas?
>
> A. Yes, sir."

While Mr. Garrison had papers before him while testifying, that circumstance alone would not vitiate his testimony. As to the pipeline tariff of ten cents a barrel, he knew what this tariff was: it was the published tariff, and was the same as shown by the record in his hand. As to the towing cost from Helena to Memphis; this was taken by Mr. Garrison directly from the defendant's own invoice, and Mr. Garrison's testimony on this point was entirely valid, as the data was supplied by the opposing party, and was not disputed. As to the tax on towing from Helena to Memphis, that, too, was supplied by defendant, and there, likewise, could be no opposition to Mr. Garrison's testimony on this point.

As to the unit sales price of 15.5 cents per gallon at the refinery at El Dorado, there is much confusion and question as to whether the witness Garrison was testifying from his own memory, refreshed by records of the company, or whether he was testifying from records which

themselves were inadmissible. Mr. Garrison, however, during his direct examination, testified from a price schedule, dated April 15, 1957—the month in which the damages for contamination were sustained—and declared that the retail price of ethyl gasoline in Memphis at that time was 16.25 cents per gallon. On cross-examination, Mr. Garrison was asked what the price schedule was, from which he was testifying. He replied: "This is a statement, a company record statement for the Lion Oil Company price schedule, Lion Oil schedule number 2. It is a photostatic copy from our books:" He was then asked:

> "Q. Are you testifying from your personal knowledge or from the company records?
>
> A. Company record."

This reply led to considerable objection, on the ground that the witness was not testifying from his personal knowledge, the Court stating, however, that the witness could refresh his memory from the record. The witness during the foregoing colloquy stated: "I can testify from other records to the same information as I have been in the petroleum business. . . . There are established records that would indicate that the same prices which the Lion Company stated, or whoever was in business here——"

> "The Court: He has made it clear enough, I believe, . . . He says that was definitely the market price on the date in question, and that he was using these records for the purpose of refreshing his memory on it. . . . Is that what you told us?
>
> A. As I understand the question, Your Honor—in making the testimony as I did, which I have actual recollection of the state market price as to the time of April '57—the paper I am referring to, to refresh my memory, happened to be Lion Oil. I will be happy to read out of the Almanac actually, which is a recap

of prices applicable to this area, **which is the same.**"
(Emphasis supplied.)

The Almanac in question was afterward used by counsel for defendant to ascertain gasoline prices during the crucial period in this case. Defendant's counsel pursued the foregoing subject:

> "Q. So, in what you already quoted from this price schedule, you are using that of course to refresh your recollection, is that correct?
>
> A. Yes, sir.
>
> Q. Then it was not you just testifying from what the price was at that time, the record furnished you By Lion Oil Company; is that correct?
>
> A. I testified to prices. I did not think I was testifying to the validity of this statement . . . . I was just quoting prices to my knowledge, refreshing my memory from this sheet of paper.
>
> Q. But you were testifying from that price schedule there, is that correct?
>
> A. Yes, sir. **I was making reference to those prices.**
> (Emphasis supplied.)
>
> Mr. Marsion: If the Court, please, I am going to object to this witness testifying from the records which he did not make, and was made some years ago by Lion Oil Company.
>
> The Court: Whether he made it or not it is immaterial, if that serves to refresh his recollection about the price on a given date."

Much of the objection to Mr. Garrison's testimony could have been cured if it had been presented in a slightly different form. There appears no reason why the Lion Oil Company price schedule could not have been introduced in evidence as a record of the company. Opposing counsel did not object to the schedule on the ground that it was not one of the regular company records kept during

April, 1957. The objection was that Mr. Garrison was testifying from such record. Ordinarily, it would seem that plaintiff's counsel would introduce the schedule into evidence, as a record of the company, or that opposing counsel would insist upon its being offered in evidence before any testimony was given with regard to it, reserving, of course, any proper objection to the admission in evidence of the document after they had an opportunity to examine it, and question the witness about it. The objections to Mr. Garrison's testimony were not based on the ground that he was testifying from records not in evidence, but that he was testifying from records. Moreover, objections that Mr. Garrison was testifying from records which he did not make, and which had been made in prior years by his company, were not sufficiently definite. The objections which were made indicated that the records were company records made in the ordinary course of business, but that because Mr. Garrison did not himself make the records in question, he could not testify regarding them. If they were company records kept in the ordinary course of business, they could have been introduced in evidence and Mr. Garrison, being then in charge, could have testified with regard to the entries, whether he made them or not.

To sustain the judgment of the District Court, there is only one issue in the case: Was there substantial evidence to prove that the "unit sales price" of the premium gasoline at El Dorado, Arkansas, was 15.5 cents per gallon in April, 1957.

As already indicated, we are of the view that this unit sales price was proved by substantial evidence; and this evidence appears in the cross-examination of Mr. Garrison, the plaintiff's witness.

On cross-examination, Mr. Garrison was asked by counsel for defendant to take Platt's Oilgram, apparently an

acknowledged price book in the gas and oil industry, in order to testify as to prices of gasoline.

Counsel for defendant asked:

"Q. All I want you to testify is your knowledge of the regular as of today or as of 1957. Then if you take your tank wagon price as shown for regular gasoline, and of premium grade, isn't there some discount to the jobber?

A. Yes, sir, yes, sir.

Q. And wouldn't you take something off of this seventeen figure?

A. From regular grade gasoline you take three and one quarter cents a gallon off, and for premium you take three and three quarters cents per gallon off.

Q. All right, then, based on this Oilgram, using then those figures, excluding taxes, state and published taxes, would you compute—well, dealer tank wagon prices in Memphis, Tennessee, in 1957?

A. On premium grade gasoline?

Mr. Marston (counsel for defendants): Yes, sir.

A. Yes. Taking the dealer tank wagon that is published at 17.1, I add three and a half cents a gallon to get the dealer tank wagon price on premium gasoline. I deduct from that three and three quarter cents allowance for the jobber, and again deduct .006 for the inspection fee.

Q. **Well, what does that give you?**

A. **16.25 cents per gallon.**

Q. **And that would be the price at which it would be sold from the tank here in Memphis, is that correct?**

A. **Yes, sir.**

Q. Now, I believe that is with truck carloads, and so forth?

A. Tank car, trucks, yes, sir.

Q. The figure you have given us is not the dealer tank wagon price, the refinery's price, is that correct?

A. Which figure are you referring to?

Q. The figure you have used, 15.9 or 15.5.

A. **15.5, as we have stated, is the wholesale price for this gallon of gas effective at El Dorado, Arkansas, at this time, to which you also add cost involved of transporting it to Memphis."** (Emphasis supplied.)

The above answer is the evidence upon which the Trial Court must have based its findings. It constituted valid evidence of the fact. It was the same as though counsel on cross-examination of the adverse witness had asked: "What was the value of ethyl gasoline at El Dorado on April 26, 1957?" and the witness had answered: "15.5 cents per gallon." Counsel, who brought out this testimony on cross-examination, never disputed it or contradicted it by other proofs. It was sufficient evidence to enable the Court to base a finding thereon.

When, to the figure of 15.5 cents per gallon are added the costs of transportation to Memphis and taxes, which are fully set forth and shown by credible evidence, the value of the gasoline per gallon at Memphis in April, 1957 was proved to be 15.929 cents per gallon as the Trial Court found. This was considerably less than the value per gallon, contended for by plaintiff, which was 16.25 cents per gallon.

It may be observed that during Mr. Garrison's cross-examination he stated at a different point in his testimony that the value of the ethyl gasoline at Memphis in April, 1957, was 16.25 cents per gallon. He further stated that at Memphis, on April 26, 1957, the regular grade gasoline at dealer tank wagon price would be 17.1 cents per gallon, with deduction for allowance to jobbers and inspection fee, plus all applicable taxes. He testified:

"Q. All right, then to get the premium how much would you add to that?

A. Three and a half cents.

Q. Three and a half cents?

A. Yes, sir.

Q. In other words, to figure premium would be three and a half cents greater than the regular?

A. At the retail price at the pump it is four cents higher, but normal sales to the wholesale jobber actually you allow them a half a cent a gallon.

Q. This was true in 1957?

A. Between, say—oh, yes, sir.

Q. For premium above regular?

A. No, sir.

Q. Has it ever been that to your knowledge?

A. Specifically at the time has it ever been two cents a gallon differential between premium and regular?

Q. At any time, yes, sir. You said—in other words, **what is that differential between the premium and regular?**

Mr. Clifton: Back in '57.

A. In '57.

Mr. Marston: Yes, sir.

A. At the time, no, it was not three and a half cents."

The foregoing testimony is most confusing, as it appears therefrom that the wholesale price of ethyl gasoline on April 26, 1957, at Memphis, might be three and one half cents—or two cents—per gallon more than the regular gasoline. If, of course, the differential between premium, or ethyl gasoline, and regular gasoline was three and one half cents a gallon, the dealer tank wagon price would be 16.25 cents per gallon, as plaintiff claims. If the differential was two cents a gallon, as might also be inferred from

Mr. Garrison's testimony, the dealer tank wagon price was 14.75 cents per gallon or less. It is possible to interpret the foregoing testimony as proof that there was a differential at the time and place in question of three and one half cents per gallon, or of two cents per gallon "for premium over regular."

Nevertheless, there was in the evidence the clear testimony of Mr. Garrison, brought out on cross-examination by counsel for the opposing party, that 15.5 cents per gallon was the wholesale price of the ethyl gasoline effective at El Dorado, Arkansas, at the time in question; and that the conceded additions to this price, consisting of towage charges and taxes, raised the value of the gasoline delivered to Memphis, and subsequent towage and export tax, to 15.929 cents per gallon, as was testified to by Mr. Garrison. As to the figure of 16.25 cents per gallon, which was also testified to by Mr. Garrison, as the wholesale price of the ethyl gasoline in Memphis at the time in question, there was uncertainty and contradiction. The value of 15.929 cents per gallon was the figure the Court finally adopted; and we are of the view that the Court's findings were amply sustained by the evidence.

In spite of the numerous observations of the Trial Court and plaintiff's counsel during the course of the case that Mr. Garrison was entitled to refresh his memory from the records, it seems that the Trial Court in its ultimate conclusion arrived at the view that Mr. Garrison had not been able to refresh his memory from the records and that the only evidence on which to base a finding of the value of the contaminated gasoline consisted of the statements of Mr. Garrison on cross-examination in reply to the questions of opposing counsel, and we need not consider the legal propositions advanced on the question of the refreshing of the memory of a witness, by resort to records. The evidence of these statements that the wholesale price

of the gasoline in question effective at El Dorado at the time in question was 15.5 cents per gallon was sufficient to enable the Court to adopt this figure as the basis of value of the gasoline, in its findings.

The Court took the testimony of Mr. Garrison as to the wholesale value of the ethyl gasoline at plaintiff's refinery at El Dorado, Arkansas, plus all expenses of getting it from the refinery to Memphis and then to Houston, where it was sold at a loss of .04129 cents per gallon. The Court found that the value of this gasoline was 15.929 cents per gallon, which included the unit sales price of the product at 15.5004 cents; the pipeline tariff, El Dorado to Helena; the towing cost, Helena to Memphis; the transportation tax, and the export tax; that the gasoline was sold to Triangle Refineries, Inc., at a unit price of 11.8 cents per gallon, resulting in a loss per gallon of .04129 cents for a total loss of $19,120.99.

The Court further found that, in addition to the gasoline, the 14,000 gallons of kerosene, which was mixed with the gasoline, was disposed of by Lion Oil to the Triangle Refineries; that the value of this product as of the time of the mixing was .11693 cents per gallon, which included the unit sales price of the product; the pipeline tariff, El Dorado to Helena; the towing cost, Helena to Memphis; the transportation tax-towing, and the export tax; that the kerosene was sold at the unit price of 11.8 cents per gallon, resulting in a gain to Lion of .00107 cents per gallon, or a total gain of $14.98; and that the deduction of this gain from the aforementioned loss resulted in a net loss to Lion Oil of $19,106.01.

In **McAllister v. United States**, 348 U. S. 19, the Court stated: "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous.

No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure." To the same effect, see also the recent opinion of this Court in **Federal Insurance Company v. S. S. Royalton**, 312 F. 2d 671.

We find no grounds for concluding that the judgment of the Trial Court was clearly erroneous.

The findings of the Trial Court as to the amount of gasoline that was contaminated, and the amount thereof for which defendants were liable in damages, were supported by the evidence.

The Trial Court allowed plaintiff interest from the date of the filing of its action. Suit was not filed until two and a half years after the loss. As heretofore remarked, the proofs in the case were not thoroughly clear. It is evident that the Court acted on a discretionary basis. Allowance of interest in admiralty is discretionary with the Court; and we cannot say that its allowance of interest from the date of the filing of the suit, but not from the date of the loss in this case was an abuse of its discretion.

In accordance with the foregoing, the judgments of the District Court are affirmed.

ORDER.

(Filed Mar. 3, 1964,
Carl W. Reuss, Clerk.)

Nos. 15,057-58.

United States Court of Appeals
For the Sixth Circuit,
In Admiralty.

No. 15,057

Monsanto Chemical Company,
Libelant-Appellee,

v.

No. 3 Bull Towing Company, The Bull Durham, and Barge NBC 965,
Respondents-Appellants.

No. 15,058

Monsanto Chemical Company,
Libelant-Cross-Appellant,

v.

No. 3 Bull Towing Company, The Bull Durham, and Barge NBC 965,
Respondents-Cross-Appellees.

Before: Weick, Chief Judge, and O'Sullivan, Circuit Judge, and McAllister, Senior Circuit Judge.

The above cause coming on to be heard on the petition for rehearing, and the Court being duly advised:

Now, Therefore, It Is Ordered, Adjudged, and Decreed that the petition for rehearing be and the same is hereby denied.

Approved for Entry:

/s/ Thomas F. McAllister,
United States Senior Circuit Judge.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 13 1964
JOHN F. DAVIS, CLERK

No. 1015.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

NO. 3 BULL TOWING COMPANY et al.,
Petitioner,

vs.

MONSANTO CHEMICAL COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondent in Opposition to the Petition for Certiorari.

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TABLE OF CONTENTS.

	Page
Table of Cases	This page
Table of Authorities	This page
Opinions Below	1
Statement of Questions Presented	2
Argument	3
Conclusion	8

Table of Cases.

Luckenback v. W. J. McCahan Sugar Ref. Co., 248 U. S. 139, 63 L. ed. 170, 39 S. Ct. 53, 1 A. L. R. 1522 (1918) 6

Mahnick v. Southern S. S. Co., 321 U. S. 96, 88 L. ed. 561, 64 S. Ct. 455 (1944) 6, 7

Morales v. Galveston, 370 U. S. 165, 8 L. ed. 2d 412, 82 S. Ct. 1226 (1962) 5

McAllister v. United States, 348 U. S. 19, 75 S. Ct. 6, 99 L. ed. 20, 25 (1954) 7

No. 3 Bull Towing Company v. Monsanto Chemical Co., 326 F. 2d 18 (6th Cir. 1963) 1

The Wilderoft, 201 U. S. 378, 50 L. ed. 794, 26 S. Ct. 467 (1906) 6

West Tenn. Limestone Co. v. Federal Barge Lines, Inc., 288 F. 2d 663 (6th Cir. 1961) 7

Table of Authorities.

5 Moore's Federal Practice (2nd Ed.), Rule 52, page 2690 ..... 6, 7

Supreme Court Rule 19 (b) 8

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BRIEF

Of Respondent in Opposition to the Petition for Certiorari.

OPINIONS BELOW.

The Trial Court filed detailed Findings of Fact and Conclusions of Law which appear at pages 22a-36a of the Joint Appendix upon which a Final Decree was entered for Respondent (Libellant) App. 37a.

The Court of Appeals for the Sixth Circuit rendered a detailed opinion on December 18, 1963, in which it thoroughly reviewed the evidence, concurred in the Findings of Fact and Conclusions of Law of the Trial Court and affirmed the Final Decree. This opinion will be found at 326 F. 2d 18 (6th Cir. 1963) as well as in Petitioner's Appendix.

STATEMENT OF QUESTIONS PRESENTED

The Petitioner (hereinafter referred to as "Bull") presents three rather long and involved questions of fact which are claimed were improperly and incorrectly answered in favor of Respondent (hereinafter referred to as Monsanto) by the Trial Court as well as the Court of Appeals. Despite the conclusions that Petitioner attempts to draw from the statement of evidence he presents, he cannot escape the findings of fact drawn from the evidence by the Trial Court which were concurred in by the Court of Appeals.

ARGUMENT.

The questions presented by Petitioner are questions of fact. They revolve around the issue of the seaworthiness of the barge tendered by Petitioner to carry Respondent's mixed cargo of petroleum products.

These questions were all resolved affirmatively in favor of Respondent by the Trial Court (App. 22a-33a). These same questions were presented to the Court of Appeals by Petitioner. The Court of Appeals, in a lengthy review of the evidence, concurred in the Findings of Fact and Conclusions of Law of the Trial Court. 326 F. 2d 18 (6th Cir. 1963).

I.

The first question posed by Petitioner is purely hypothetical. It bears no relationship either to the Trial Court's findings of fact or to the conclusions of law which were entered. Basically, Petitioner interprets the findings below as holding that a carrier who supplies a seaworthy vessel and is not guilty of actionable negligence can be held liable for damage to a shipment in transit. Not only is it difficult to conceive of any legal grounds for such an interpretation, but it is impossible to draw such a conclusion from the Trial Court's holding. On the contrary, the Trial Court found:

(1) as a matter of fact, that the No. 5 starboard valve which controls the flow into and out of the No. 5 starboard tank failed to close properly and thereby permitted kerosene in the No. 5 tank to be pumped into the main header simultaneously with the ethyl gasoline (Finding 14, App. 29a);

(2) as a matter of law, that the vessel was unseaworthy due to the faulty condition of the No. 5 valve, which caused the contamination; and

(3) as a matter of law, that Petitioner failed satisfactorily to show that it did not breach its warranty

of seaworthiness concerning the barge by reason of the defective condition of the No. 5 valve (Conclusion 6, App. 35a).

There is ample evidence introduced to support the findings of fact, as stated by the Court of Appeals. This evidence, introduced by Petitioner, showed conclusively that the valve did not functio. properly because the threads were fouled with foreign matter. The Court of Appeals set this out succintly:

> "The Trial Court found that due to the malfunctioning of the valve, brought about by the cord being entwined around and in the threads of the valve, the barge was unseaworthy, and that its unseaworthy condition was the direct and proximate cause of the damages resulting to plaintiff (Monsanto) company from the contamination of the kerosene with the ethyl gasoline.
>
> "It is clear that the valve with the cotton cord in its threads did not operate properly. That is seen from the fact that it was leaking kerosene into the other petroleum products until Marion Warren, the mate of the tug, came aboard and succeeded in forcing it closed by jerking the valve wheel with all the force of which he was capable. *The valve did not properly seat with the ordinary force with which valves are closed. The barge was unseaworthy. With the cord intertwined in the threads of the valve, so that it would leak kerosene while the gasoline from other compartments was being pumped out through the shore hose, the barge was not reasonably fit for its intended use.* The duty to furnish a seaworthy vessel is absolute. Mitchell v. Trawler Racer, Inc., 362 U. S. 539" (Italics supplied).
>
> 326 F. 2d at page 20.

What Petitioner overlooks is that the unseaworthiness of the barge stems from the malfunction of the valve.

The fact that it would not seat properly when the ordinary force with which such valves are closed was applied was the unseaworthy cause of the contamination. This is an issue of fact resolved by the Trial Court against Petitioner.

II.

Petitioner's second question is whether or not a vessel is unseaworthy as a matter of law when a loss is not caused by the vessel but by the isolated and unforeseeable introduction of a foreign agent from without. Again Petitioner has attempted to set up a straw man, because the Trial Court simply did not hold that a vessel is unseaworthy as a matter of law under the circumstances postulated in the question. We submit that the one case cited by Petitioner to support this proposition, Morales v. Galveston, 370 U. S. 165, 8 L. Ed. 2d 412, 82 S. Ct. 1226 (1962), is totally inapposite because it deals with a personal injury problem and not damage to cargo, and is governed by a completely different framework of law. The case involved a longshoreman who was injured aboard a vessel by a chemical insecticide contained in the grain cargo being loaded. In other words, the Supreme Court did not hold that the vessel was unseaworthy; it simply held that the longshoreman was injured by the contaminated grain, not by the vessels' unseaworthiness.

The basic point in the instant case is that the vessel was unseaworthy as found by the Trial Court upon the facts. The Court of Appeals concurred in this result since, "with the cord intertwined in the threads of the valve, so that it would leak kerosene while the gasoline from other compartments was being pumped out through the shore hose, the barge was not reasonably fit for its intended use."

326 F. 2d at page 21.

The Trial Court, upon all the evidence presented, found as a fact, that the No. 5 starboard valve which controls the flow into and out of the No. 5 starboard tank failed to close properly and thereby permitted kerosene in the No. 5 tank to be pumped into the main header simultaneously with the ethyl gasoline (Finding 14, App. 29a).

The burden was then upon the Petitioner to explain away the presumption, inference or conclusion of unseaworthiness presented. No such evidence was introduced. In fact, the evidence which was introduced was an elaboration upon the unseaworthy condition of the barge since it was shown that the valve, which permitted the contamination, failed to close properly because of foreign matter, a cord, fouled in its threads keeping it from seating properly. There was no other explanation. Nor was there any proof as to when the cord was put there, by whom, for how long it had been there. Petitioner simply failed to carry his burden of proof, which has been ruled on twice, and he cannot be now heard to complain.

Under the "two-court" rule, this Court does "not, in admiralty, more than in other cases, review the concurrent findings of fact of two courts below."

Mahnick v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 561, 64 S. Ct. 455 (1944);

Luckenback v. W. J. McCahan Sugar Ref. Co., 248 U. S. 139, 63 L. Ed. 170, 39 S. Ct. 53, 1 A. L. R. 1522 (1918);

The Wilderoft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467 (1906);

5 Moore's Federal Practice (2nd Ed.), Rule 52, page 2690.

A finding of unseaworthiness is a finding of fact.

Luckenback v. W. J. McCahan Sugar Ref. Co., 248 U. S. 139, 63 L. Ed. 170, 39 S. Ct. 53, 1 A. L. R. 1522 (1918).

The Petition for Certiorari does not show any clearly erroneous finding of fact, either by the Trial Court or by the Court of Appeals. His argument (pages 12-17) would be more appropriate before the Trial Court or the initial reviewing Court than the Supreme Court.

III.

Petitioner's third question is a rehash of a factual issue and primarily deals with the sufficiency of the evidence. We submit, again, that the "two-court" rule is binding on this factual decision.

Mahnick v. Southern S. S. Co., 321 U. S. 96, 88 L. ed. 561, 64 S. Ct. 455 (1944);

5 Moore's Federal Practice (2nd Ed.), Rule 52, page 2690.

Even in the Court of Appeals, a review of this factual question decided by the Trial Court is limited to "clearly erroneous" findings. This is too well decided to require numerous citations.

McAllister v. United States, 348 U. S. 19; 75 S. Ct. 6, 99 L. ed. 20, 24 (1954);

West Tenn. Limestone Co. v. Federal Barge Lines, Inc., 288 F. 2d 663 (6th Cir. 1961).

The Court of Appeals went into the question of proof of damages thoroughly and, after this review, affirmed the Trial Court's finding of fact.

> "We have come to the conclusion that the evidence supports the findings of fact of the Trial Court . . . it was for the Court to choose among the conflicting proofs of damage; and that its judgment should be affirmed upon its findings of fact and conclusions of law."

326 F. 2d at page 21.

CONCLUSION.

Petitioner apparently overlooks Rule 19 (b) of this Court for the Petition does not point out any conflict in decisions of different circuits; has not presented for review a Court of Appeals decision on an important question of Federal law which has not heretofore been decided by this Court; and has not presented for review, a Court of Appeals decision in conflict with applicable decisions of this Court. Neither has the Court of Appeals departed from the accepted and usual course of judicial proceedings.

Supreme Court Rule 19 (b).

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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